



Family Courts

Recommended Legal Findings and Orders for Cases Involving the Indian Child Welfare Act (ICWA)*

I. Inquiry (at every hearing) (Fam. Code, § 177 (incorporating Welf. & Inst. Code, § 224.3); Cal. Rules of Court, rule 5.481(a))

- A. The court finds that the petitioner, the agency (if applicable), and the court have inquired whether the child is or may be an Indian child; and
- B. The court finds that the *Indian Child Inquiry Attachment* (form ICWA-010(A)) has been completed and is in the court file; and
- C. The court finds either that both parents and the Indian custodian (if any) have completed the *Parental Notification of Indian Status* (form ICWA-020) and those documents are in the court file *or* the petitioner and agency (if applicable) have used reasonable diligence to find and inform the parent, Indian custodian, or guardian that the court has ordered them to complete an ICWA-020 form; and
- D. The court finds, after the petitioner and agency (if applicable) have inquired and the court has inquired, that there is reason to believe the child may be an Indian child; or
- E. The court finds, after the petitioner and agency (if applicable) have inquired and the court has inquired, that there is no reason to believe the child may be an Indian child; and
- F. If there is reason to know that the child is an Indian child, the court finds that the petitioner and agency (if applicable) have interviewed the parents, Indian custodian, and extended family and have contacted the Bureau of Indian Affairs (BIA) to obtain information contained in Welfare and Institutions Code section 224.2(a)(5).
- G. If there is reason to believe that the child is an Indian child:
 - 1. The court finds that the petitioner and agency (if applicable) have inquired whether the child may be a resident of or domiciled on a reserve.
 - 2. The court finds that the petitioner and agency (if applicable) have inquired whether the child is the ward of a tribal court.

II. Application (at any hearing) (ICWA § 1903(1) and (4); Fam. Code, § 170 (a) and (c); Cal. Rules of Court, rule 5.480)

- A. This is an “Indian child custody proceeding” within the meaning of the act because it may result in the adoption of the child or termination of parental rights to the child or the granting of care, custody, and control of the child to someone other than the child’s Indian custodian or biological parent and the child’s Indian custodian or biological parent will not be able to have the child returned on demand.
- B. The child may be an Indian child, and therefore the act may apply.
- C. The child is an Indian child, because the court has proof of tribal membership or the tribal determination received by the court indicates that the child is a member or is eligible for membership.
- D. The child is not an Indian child, because the tribal determination received by the court indicates that the child is not a member and is not eligible for membership.
- E. The court will proceed as if the act does not apply, because proper notice was sent to the tribe(s) with which the child is affiliated and/or to the BIA and 60 days have elapsed with no determinative response from the tribe(s) and/or BIA. However:
 - 1. If the court or parties receive information on the child’s Indian heritage, it will send the information to the tribe(s) and/or BIA.
 - 2. If the court or parties later receive evidence of the applicability of the act, then the court will apply the act.

*All citations in this chart are to the Indian Child Welfare Act (25 U.S.C. 1901 et seq.), California Family Code, California Welfare and Institutions Code, and California Rules of Court.

III. Notice (at every hearing) (ICWA § 1912(a); Fam. Code, § 180; Cal. Rules of Court, rule 5.481(b))

- A. Notice to the tribe(s) was addressed to the tribal chairperson unless the tribe has designated another agent for service of ICWA notice.
- B. The court finds that proof of notice has been filed with the court and includes a copy of the notice(s) sent, the original certified mail receipt(s), and the original return receipt(s), as well as copies of any correspondence received from the Indian entity relevant to the minor's Indian status.
- C. The court finds *either* that the identity or location of the parent(s) or Indian custodian or tribe cannot be determined *or* that the child has Indian ancestry but is not a member of an identified tribe or eligible for membership in an identified tribe; notice has been provided to the specified office of the Secretary of the Interior. A copy of the notice sent and the return receipt have been filed with the court.
- D. The court finds that notice has been provided by sending *Notice of Child Custody Proceeding for Indian Child* (form ICWA-030) with a copy of the petition and birth certificate, if available, by registered or certified mail with return receipt requested, and additional notice by first-class mail, to the parent, tribe, Indian custodian, and Bureau of Indian Affairs.

IV. Tribal Representative/Intervention (at every hearing) (ICWA § 1911(c); Fam. Code, § 177 (incorporating Welf. & Inst. Code, § 224.2(5)(G)(i)); Cal. Rules of Court, rule 5.482(e))

- A. The (*name of tribe*) _____ Tribe has acknowledged that the child is a member of or is eligible for membership in the tribe and will monitor the case.
- B. The (*name of tribe*) _____ Tribe has designated (*name of representative*) _____ to be the tribe's representative for the purposes of this proceeding.
- C. The tribe's representative is entitled to the rights listed in *Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child* (form ICWA-040).
- D. The (*name of tribe*) _____ Tribe has intervened in this case and will be treated as a party to the proceedings.

V. Continuances (all hearings) (ICWA § 1912(a); Fam. Code, § 177 (incorporating Welf. & Inst. Code, § 224.2(d)); Cal. Rules of Court, rule 5.482(a))

On request, this court grants the parent(s), Indian custodian, *or* tribe a continuance of up to 20 days to prepare for the hearing.

VI. Appointment of Counsel (at every hearing) (ICWA § 1912(b); Fam. Code, § 180(b)(5)(G)(v)) (Note: Fam. Code, § 180 stipulates generally what must be included in an ICWA notice. These notices are now uniform across all case types and the notice includes a statement regarding appointment of counsel. Unlike the Welf. & Inst. Code (at § 317) and Prob. Code (at § 1474) the Fam. Code contains no separate substantive provision dealing with appointment of counsel and Welf. & Inst. Code, § 317 is not among those incorporated by reference under Fam. Code, § 177)

- A. The court finds that the parent(s) and/or Indian custodian appear to be indigent; and
- B. The court hereby appoints counsel to represent the parent(s) and/or Indian custodian; or
- C. The court finds that the parent(s) and/or Indian custodian do not appear to be indigent.

VII. Consent Requirements (ICWA § 1913; Fam. Code, § 8606.5)

- A. The court finds that the parent(s)' consent is in writing, given at least 10 days after the child's birth, and recorded before a judge.
- B. The court certifies that the terms and consequences of the consent were fully explained and fully understood by the parent(s).

VIII. Detriment and Standard of Proof (at hearing for custody by nonparent/Indian custodian or termination of parental rights) (ICWA § 1912(e) and (f); Fam. Code, §§ 177 (incorporating Welf. & Inst. Code, § 361.7), 3041(e), 7822(e), 7892.5; Cal. Rules of Court, rules 5.484(a) and 5.485(a))

- A. For a foster-care placement,¹ the court finds by *clear and convincing evidence*, including the testimony of one or more qualified expert witnesses, that the continued custody of the child by the parent, legal guardian, or Indian custodian is likely to result in serious emotional or physical damage to the child.
- B. For termination of parental rights, the court finds by evidence *beyond a reasonable doubt*, including the testimony of one or more qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

IX. Active Efforts (hearing for custody by nonparent/Indian custodian or termination of parental rights) (ICWA § 1912(d); Fam. Code, § 177 (incorporating Welf. & Inst. Code, § 361.7); Cal. Rules of Court, rules 5.484(c) and 5.485(a)(1))

- A. If a tribe has indicated that the child would be eligible for enrollment if certain steps are followed, the court finds that the petitioner and/or agency (if applicable) have made active efforts by taking steps to secure tribal membership. (Cal. Rules of Court, rules 5.482(c), 5.484(c).)
- B. The court finds that active efforts have been made to provide culturally appropriate remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
- C. The court finds that the tribe has been consulted in providing services and programs to the child and the parent(s) or Indian custodian.

X. Placement Preferences (hearings for adoption, including voluntary adoptions, or granting custody to someone other than the parent(s)/Indian custodian) (ICWA § 1915; Fam. Code, § 177 (incorporating Welf. & Inst. Code, § 361.31); Cal. Rules of Court, rules 5.482(g) and 5.484(b))

- A. The court finds that the adoption or custody of the child adheres to the placement preferences under the act when placing the child.
- B. The court finds that the tribe has been consulted concerning the appropriate placement of the child.
- C. The court finds good cause to deviate from the placement preferences under the act on the grounds that _____.
_____. (Refer to Cal. Rules of Court, rule 5.484(b).)

¹ Such placement includes any order that grants custody and control of an Indian child to someone other than the parents or Indian custodian and the parents or Indian custodian cannot have the child returned on demand, but parental rights have not been terminated, including such an order under Family Code section 3041.

XI. Jurisdiction and Transfer (at any hearing) (ICWA § 1911; Welf. & Inst. Code, § 305.5; Cal. Rules of Court, rule 5.483)

- A. The court finds that the child resides or is domiciled on the reservation of the _____ Tribe or that the child is the ward of the _____ Tribe, and, accordingly, the _____ Tribe has exclusive jurisdiction.
- B. The court finds that this juvenile court and the court of the child's tribe have concurrent jurisdiction.
- C. The (*specify tribe or parent or Indian custodian*) _____ has petitioned this court to transfer the proceedings to the tribal court, and, finding no good cause not to transfer, this court transfers the case to the tribal court of (*name of tribe*) _____ Tribe.
- D. After holding an evidentiary hearing, this court finds that the (*specify tribe or parent or Indian custodian*) _____ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following reason is good cause not to transfer the case to the tribal court:
 - 1. The child's parent objects to the transfer;
 - 2. The child's tribe does not have a tribal court or any other administrative body as defined in section 1903 of the Indian Child Welfare Act; or
 - 3. The tribal court of the child's tribe declined the transfer.
- E. After holding an evidentiary hearing, this court finds that the (*specify tribe or parent or Indian custodian*) _____ has petitioned this court to transfer the proceedings to the tribal court, and the court finds that the following circumstances in the case constitute in the court's discretion good cause not to transfer the case to the tribal court:
 - 1. The evidence necessary to decide the case cannot be presented in tribal court without undue hardship to the parties;
 - 2. This proceeding is at an advanced stage, and petitioner did not make the request within a reasonable time after receiving notice of this proceeding;
 - 3. The child is over the age of 12 and objects to the transfer; or
 - 4. The child is over the age of 5 and has had little or no contact with his or her tribe or members of the child's tribe, and the child's parents are not available.

XII. Notification After Adoption (ICWA § 1951; Fam. Code, § 9208; Cal. Rules of Court, rule 5.487)

- A. Following the decree of adoption, the court orders that a copy of the decree of adoption be provided to the Secretary of the Interior.
- B. If the biological parent has executed an affidavit requesting confidentiality, the court orders that a copy of this affidavit be provided along with the copy of the adoption decree.